

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LINNIE D. WIDENER**  
Claimant

VS.

**DILLON COMPANIES**  
Self-Insured Respondent

)  
)  
)  
)  
)  
)  
)

Docket No. 1,024,361

**ORDER**

Respondent requests review of the November 30, 2005 preliminary hearing Order entered by Special Administrative Law Judge Vincent Bogart.

**ISSUES**

The Special Administrative Law Judge (SALJ) found claimant suffered accidental injury arising out of and in the course of employment. The SALJ further found claimant failed to give respondent notice of the accident within 10 days but provided notice within 75 days and established just cause for not giving the 10-day notice.<sup>1</sup>

The respondent requests review of the following: (1) whether the claimant's accidental injury arose out of and in the course of employment; (2) whether timely notice was given; and, (3) whether medical expenses should be ordered paid.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant was a stocker for respondent and worked from 11 p.m. to 7:30 a.m., four days a week. His job duties included unloading grocery items from trucks, breaking down pallets, distributing the product to the aisles and then stocking the shelves. Claimant testified this involved constant bending, twisting, stooping as well as lifting weights varying from 25 to 100 pounds.

---

<sup>1</sup> See K.S.A. 44-520.

Beginning May 6, 2005 through May 21, 2005, claimant's left foot began hurting but he was able to walk off the pain. Then his leg and hip started hurting as well but he could again continue to work and the pain would stop. Claimant did not report this to anyone because he thought it was due to his age and a part of life. He testified the pain in his hip, leg and foot continued to progress and occurred more frequently during this time frame. The claimant would take a break and then the pain would subside.

On a Thursday, claimant was unloading dog food and as he bent over his back felt like somebody was "squeezing" it. But as he continued working and then went to break his pain eased and stopped. The next night as he was unloading gallon cans of produce he experienced the same sensation in his back and it hurt. The pain eased when he went on break but returned when he resumed his work. As he continued working the pain again subsided and he did not report the incidents because he thought the pain was just because he was getting older.

Claimant described the pain he experienced lifting the dog food and cans of produce as a sharp burning pain in his leg that he had not experienced before performing those activities. Claimant testified:

Q. Okay. Now, these instances that you have mentioned here today with the dog food, the gallon containers of food, did you feel any sudden sharp burning pain in your back or down your leg during any of that?

A. My leg, it was sharp burning pain down my leg is what I noticed more than anything, I mean my back felt achy and like somebody was squeezing it, but I had a pain shoot down my leg and it was a burning and it just -- I had never felt anything like it before.<sup>2</sup>

Claimant went home that Saturday morning and went to bed but when he awoke and got out of bed he was unable to stand on his leg.

On Sunday, May 22, 2005, the claimant sought medical treatment at William Newton Memorial Hospital's emergency room. The records from the emergency room contain a history that claimant's pain started a week ago after tilling his garden. It was noted his back was stiff after tilling then he shoveled dirt and his pain worsened. Finally, it was noted claimant had back pain before but never into the leg.<sup>3</sup> The Initial Physical Assessment form noted claimant was complaining of back pain into his left leg that he was able to walk out during the past week. And it further noted claimant had been limping since

---

<sup>2</sup> P.H. Trans. at 15.

<sup>3</sup> *Id.*, Cl. Ex. 3.

he tilled the garden one week ago.<sup>4</sup> The claimant received a shot of pain medication and was advised to follow-up with his physician, Dr. Bryan Davis.

On May 24, 2005, claimant sought treatment from Dr. Davis. The doctor's note of that visit contained the following pertinent history:

Presents today with back pain into his leg. He reports starting to have difficulty last week, mid-week. He was running a garden rototiller and began to have back soreness and stiffness while rototilling. **He went to work that night and it worsened and has had great pain since.**<sup>5</sup> (Emphasis Added)

Claimant testified that when he sought treatment from Dr. Davis he still did not think that he had suffered an injury at work.

Dr. Davis ordered an MRI, physical therapy and referred claimant to a neurosurgeon. On August 16, 2005, the claimant had surgery for a herniated disk at L4-5.

Claimant testified that while still on crutches after surgery he had gone to the attorney representing him on his bankruptcy. She asked what had happened and why he was using crutches. Claimant explained that he had come home from work and when he got up after sleeping he couldn't move. His bankruptcy attorney suggested it sounded like a work-related incident. Claimant was advised to speak with a workers compensation attorney. Claimant immediately followed that suggestion.

Upon direction from his present counsel the claimant went to Dr. Davis and received a note from the doctor that indicated the doctor believed claimant's back problem was work related.<sup>6</sup>

The claimant denied that he had been tilling and shoveling but explained why the medical records contained those references:

Q. What did you tell the folks at the hospital about the pain in your back?

A. They asked me if - - what I had done to cause it, and I couldn't remember doing anything, I had taken some of my wife's pain medication to try and ease the pain up, and I was hurting so bad, and I was trying to remember and the only thing I could remember doing was, we have a pool for our grandchildren, we had put it up last year and we noticed that one side of it was a little - - had some lumps in it, and I was going to try and smooth that out, so I had borrowed a neighbor's tiller and I had

---

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*, Cl. Ex. 1.

<sup>6</sup> *Id.*

tilled those lumps up and took a rake and smoothed them out, and whenever the nurse asked me if I remembered doing anything, the only thing I could remember doing at home was using that tiller, which was - - and I couldn't give you a date for sure, but it was like around the first of the month that I had used that tiller.<sup>7</sup>

Respondent argued the medical records only contain references to a non-occupational cause for injury as a result of claimant using a tiller and shoveling. Respondent further argues claimant did not report a work-related injury until after he met with his attorney. Although otherwise compelling, this argument fails to account for the medical record of claimant's initial visit with Dr. Davis on May 24, 2005. That visit occurred before claimant's consultation with an attorney. As previously noted, the doctor indicated claimant had experienced problems after tilling but the note further indicated claimant had gone to work that night and his condition had worsened.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>8</sup> Even assuming the claimant initially injured his back tilling, Dr. Davis' medical record from his initial examination of claimant supports claimant's assertion that work activities aggravated or worsened the condition. Based upon the record compiled to date the claimant has met his burden of proof that he suffered accidental injury arising out of and in the course of his employment.

The Workers Compensation Act requires a worker to provide the employer timely notice of a work-related accident or injury. The Act reads:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as

---

<sup>7</sup> *Id.* at 16-17.

<sup>8</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

provided in this section, or (c) the employee was physically unable to give such notice.<sup>9</sup>

It is undisputed that claimant did not provide respondent notice of his accidental injury within ten days of the last day he worked nor even while he received medical treatment ultimately including surgery.

K.S.A. 44-520 provides that notice may be extended to 75 days from the date of accident if claimant's failure to notify respondent under the statute was due to just cause. In considering whether just cause exists, the Board has listed several factors which must be considered:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
- (2) Whether the employee is aware he or she has sustained an accident or an injury on the job.
- (3) The nature and history of claimant's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

In this case, claimant's symptoms developed gradually as he noted the onset of pain which increased but nonetheless was alleviated by taking breaks. Claimant was initially able to work through the pain which he attributed to general aches and pains from aging. Claimant continued to work and instead of subsiding the pain finally increased to the point where after some heavy lifting at work, he was unable to put weight on his leg the next morning and he sought emergency treatment. The onset of pain was gradual and not debilitating until later.

Claimant repeatedly attributed the gradual onset of pain to the fact that he was getting older and because he did not suffer a specific traumatic incident he did not think he had suffered a work-related accident. And claimant denied that he was aware there was a requirement to provide notice of an accident within ten days and further denied that he had ever seen a notice posted at the workplace that contained such information.

These facts demonstrate the difficulty workers sometimes experience in determining whether their aches and pains are the result of a work-related injury or merely soreness

---

<sup>9</sup> K.S.A. 44-520.

associated with their work or aging. Under these facts and circumstances, claimant had just cause that extended the notice deadline to 75 days following the incident. Accordingly, the SALJ's decision is affirmed.

Finally, in its Application for Board Review and Docketing Statement, respondent raised the issue whether medical expenses incurred should be ordered paid.

This is an appeal from a preliminary hearing. The Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction.<sup>10</sup> In addition, K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified. A contention that the ALJ has erred in ordering medical expenses paid is not an argument the Board has jurisdiction to consider. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation. The respondent's appeal of this issue is dismissed and the SALJ's Order remains in full force and effect.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.<sup>11</sup>

**WHEREFORE**, it is the finding of the Board that the Order of Special Administrative Law Judge Vincent Bogart dated November 30, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January 2006.

---

BOARD MEMBER

c: Orvel Mason, Attorney for Claimant  
Edward D. Heath, Jr., Attorney for the Self-Insured Respondent  
Vincent Bogart, Special Administrative Law Judge  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

---

<sup>10</sup> K.S.A. 2004 Supp. 44-551(b)(2)(A).

<sup>11</sup> K.S.A. 44-534a(a)(2).